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06                   UNITED STATES DISTRICT COURT  
07                   WESTERN DISTRICT OF WASHINGTON  
08                   AT SEATTLE

09         DIANE L. MITCHELL-BETTINE,                   )  
10   )      CASE NO. C12-5279-RAJ-MAT  
11         Plaintiff,                                    )  
12   )  
13         v.    )      REPORT AND RECOMMENDATION  
14         MICHAEL J. ASTRUE,                           )      RE: SOCIAL SECURITY  
15         Commissioner of Social Security,           )      DISABILITY APPEAL  
16   )  
17         Defendant.                                   )  
18   )  
19   )

20         Plaintiff Diane Mitchell-Bettine proceeds through counsel in her appeal of a final  
21 decision of the Commissioner of the Social Security Administration (Commissioner). The  
22 Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a  
hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision,  
the administrative record (AR), and all memoranda of record, the Court recommends that this  
matter be reversed and remanded for further proceedings.

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## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1956.<sup>1</sup> She has a GED and some college education, and has previously worked in retail sales, as a warehouse laborer, as an in-home caregiver, and as a trainer for people with developmental disabilities. (AR 53-59, 187.)

On June 24, 2008, Plaintiff filed an application for DIB. (AR 122-24.) That application was denied initially and on reconsideration, and Plaintiff timely requested a hearing. (AR 76-81, 85-86.)

On July 29, 2010, ALJ Verrell Dethloff held a hearing, taking testimony from Plaintiff. (AR 45-73.) On August 16, 2010, the ALJ issued a decision finding Plaintiff not disabled. (AR 30-40.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on December 1, 2011 (AR 11-14), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

## **JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## **DISCUSSION**

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it

<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff not  
02 engaged in substantial gainful activity between January 5, 2002, and the date last insured.  
03 (AR 35.) At step two, it must be determined whether a claimant suffers from a severe  
04 impairment. The ALJ found that prior to Plaintiff's date last insured, the record did not  
05 contain medical signs or laboratory findings substantiating the existence of any medically  
06 determinable impairment. (AR 35-37.) The ALJ thus found Plaintiff not disabled at step two  
07 and did not continue on to any further steps in the sequential evaluation process.

08 This Court's review of the ALJ's decision is limited to whether the decision is in  
09 accordance with the law and the findings supported by substantial evidence in the record as a  
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
11 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
12 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
13 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
14 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
15 F.3d 947, 954 (9th Cir. 2002).

16 Plaintiff argues the ALJ erred in finding that none of her impairments were medically  
17 determinable. The Commissioner concedes that the ALJ erred in finding Plaintiff's mental  
18 impairments to be not medically determinable, but argues that the error was harmless because  
19 her mental impairments were nonetheless not severe.

20 Step-Two Findings

21 The ALJ summarized the medical records related to the relevant period (AR 35-37),  
22 and ultimately concluded:

01           After considering all of the relevant medical evidence the undersigned  
02 finds that in 2002, the claimant experienced an episode of depression,  
03 exacerbated by polysubstance abuse, which was brought under control with  
04 medication, therapy and substance abuse treatment. This condition did not last  
05 for a continuous period of not less than 12 months. Other records reflect that  
06 on or about the claimant's date last insured, she did not have a medically  
07 determinable severe impairment.

08           Accordingly, there were insufficient medical signs or laboratory  
09 findings to substantiate the existence of a medically determinable impairment  
10 through the date last insured. As indicated, claimant has the burden of  
11 establishing a severe impairment, and of providing sufficient evidence to  
12 establish a residual functional capacity. In this case the record is inadequate to  
13 establish a residual functional capacity for the claimant prior to the date last  
14 insured. The conclusion must be reached that she had no severe impairment  
15 prior to that date. *See generally*, Social Security Ruling 96-4p.

16 (AR 37.) The ALJ went on to explain why Plaintiff's testimony, and the evidence provided  
17 by her ex-husband, was insufficient to establish the existence of a medically determinable  
18 impairment. (AR 38-39.)

19           The Commissioner now concedes that the ALJ erred in finding that Plaintiff had not  
20 established the existence of medically determinable mental impairments, but that this error is  
21 harmless because Plaintiff's mental impairments were not severe. In order to offer this  
22 harmless-error analysis, the Commissioner argues that the medical evidence indicates that  
Plaintiff's impairments are not severe.

23           While the Commissioner may believe the medical evidence establishes only mild  
24 impairment, the ALJ did not explicitly enter such a finding nor fully analyze the medical  
25 evidence for purposes of evaluating the severity of Plaintiff's impairments during the relevant  
time period. For example, the ALJ referenced the opinion of Andrew Hwang, M.D., who  
evaluated Plaintiff in 2002 and opined that she had moderate, marked, and severe functional  
limitations, and the opinion of John Haws, M.D., who also evaluated Plaintiff in 2002 and

01 assigned her a Global Assessment of Functioning (“GAF”) score of 55. (AR 36 (citing AR  
02 221-228).) The ALJ did not assign any particular weight to those opinions, though he noted  
03 that he believed Dr. Hwang’s opinion had less probative value than the opinions of treating  
04 sources, such as Lynne Dearing, ARNP, who met with Plaintiff for psychiatric services over a  
05 period of years, beginning in 2003. (AR 36.) The record contains Ms. Dearing’s treatment  
06 notes from the relevant time period, but these notes do not shed much light on Plaintiff’s  
07 functional capabilities. Most of them are hand-written and difficult to decipher, and while  
08 they seem to suggest that Plaintiff’s medication stabilized her mental status, illegible  
09 treatment notes obscure any information regarding what functional abilities remained during  
10 the relevant period. (AR 225-61.) Furthermore, Plaintiff testified at the administrative  
11 hearing about the effect of her depression on her ability to leave her house unaccompanied or  
12 even get out of bed in 2004 and 2005. (AR 63-68.)

13       Though the ALJ noted that various providers had diagnosed Plaintiff with multiple  
14 mental disorders, the ALJ rejected those diagnoses because Plaintiff’s symptoms were  
15 “brought under control with medication, therapy and substance abuse treatment,” and did not  
16 last for a continuous period of at least twelve months. (AR 37.) Though the ALJ states that  
17 he concludes that Plaintiff’s impairments are not medically determinable, some of his analysis  
18 (e.g., the discussion of Plaintiff’s amenability to treatment) suggests that he considered the  
19 severity of Plaintiff’s symptoms without explicitly discussing it. The ALJ’s lack of explicit  
20 discussion of Plaintiff’s symptoms is particularly absent regarding her testimony and her ex-  
21 husband’s evidence; because the ALJ concluded that neither Plaintiff’s nor Plaintiff’s ex-  
22 husband could provide probative evidence as to the existence of a medically determinable

01 impairment, he truncated his analysis of their testimony and did not fully evaluate their  
02 credibility. (AR 38-39.)

03 The ALJ's truncated approach prevents the Court from concluding that the ALJ's error  
04 is harmless, as the Commissioner urges. Though the Commissioner contends that the ALJ's  
05 decision should be affirmed because "medical records establish [that] Plaintiff's mental  
06 impairments were mild," the ALJ did not actually enter such a finding, given that he found  
07 that the evidence did not support the existence of impairments at all. *See* Dkt. 13 at 5. The  
08 Commissioner essentially asks the Court to do what it concedes the ALJ should have done:  
09 weigh the medical evidence, along with Plaintiff's testimony and the lay evidence, in order to  
10 determine that Plaintiff's impairments during the relevant period were not severe. The Court  
11 may review an ALJ's decision for legal error and to determine if it is supported by substantial  
12 evidence, but cannot review a finding that was not made: namely, whether Plaintiff's  
13 impairments are severe. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) ("We review  
14 only the reasons provided by the ALJ in the disability determination and may not affirm the  
15 ALJ on a ground upon which he did not rely.").

16 Because the Commissioner concedes that the ALJ erred in finding that Plaintiff's  
17 impairments were not medically determinable, and because the Court cannot find this error to  
18 be harmless on the record before it, this case must be remanded for additional administrative  
19 proceedings.

20 **CONCLUSION**

21 For the reasons set forth above, this matter should be REVERSED and REMANDED  
22 for further administrative proceedings. On remand, the ALJ shall consider the severity of

01 Plaintiff's medically determinable impairments, and proceed through the disability evaluation  
02 process if necessary.

03 DATED this 24th day of January, 2013.

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Mary Alice Theiler  
United States Magistrate Judge

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